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IN THE

Supreme Court of the United States

October Term, 1963.

No. 481.

VIKING THEATRE CORPORATION,
Petitioner,
v.
PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS METRO-GOLDWYN-MAYER, INC., COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, and WARNER BROS. PICTURES DISTRIBUTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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INDEX.

	Page
QUESTIONS PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
1. Viking's Entry Into the Competitive Market	6
2. The Licensing of Films First-Run to the Viking	7
A. Viking's Dealings with Metro-Goldwyn-Mayer	10
B. Viking's Dealings with Columbia	13
C. Viking's Dealings with United Artists	13
D. Viking's Dealings with Paramount	15
E. Viking's Dealings with Universal	16
F. Viking's Dealings with Warner Bros.	17
3. The Splits of Product in First-Run Philadelphia	18
4. The Alleged "Discriminatory Practices"	20
SUMMARY OF ARGUMENT	26
ARGUMENT	30
I. The Splits in First-Run Philadelphia Were Lawful and Did Not Injure the Viking Theatre	31
The Legality of Splits to Which a Distributor Consents	33
The Reasonableness of the Distributors' Consent	35
Petitioner's Sub-Market Monopolization Theory	38
Viking's Claim That Because of Splits It Paid Higher Film Rental	42
Viking's Percentage Approach to Film Rental	44
Petitioner's Authorities Are Inapplicable	46
II. The Trial Court Correctly Held That No Damage Was Shown	49
III. Paramount's Agreement With Goldman Was Lawful and Imposed No Restraint on Viking	54
IV. The Trial Court's Rulings on Evidence Were Proper	59
CONCLUSION	64

TABLE OF CASES CITED.

	Page
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899)	46
Alexander Milburn Co. v. Union Carbide & Carbon Corp., 15 F. 2d 678 (4th Cir., 1926), cert. den. 273 U. S. 757 (1926)	35, 47
Brown v. Western Massachusetts Theatres Inc., 288 F. 2d 302 (1st Cir., 1961)	34
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U. S. 690 (1962)	9, 48, 49
Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156 (1922)	35
Safeway Stores v. Oklahoma Retail Grocers Assn., 360 U. S. 334 (1959)	30
Samuel Goldwyn Productions Inc. v. Fox West Coast Theatres Corp., 194 F. Supp. 507 (N. D. Cal. 1961), aff'd. 9th Cir. No. 17,725, Jan. 24, 1964) (not yet reported)	33
Timken Roller Bearing Co. v. United States, 341 U. S. 593 1951)	46
United States v. National Lead Co., 332 U. S. 319 (1947)	46
United States v. Loew's Inc., 1962 CCH Trade Cases, Par. 70,347	34
United States v. Paramount Pictures, Inc., 334 U. S. 131 (1948)	27, 34, 36, 47, 58

STATUTES AND REPORTS CITED.

	Page
Clayton Act:	
§ 4, 15 U. S. C. § 15	2, 35, 38, 49, 56
§ 16, 15 U. S. C. § 26	2
Sherman Act,	
§ 1, 15 U. S. C. § 1	2, 5
§ 2	5
Committee Report on Procedure and Antitrust and Other Protracted Cases, adopted by the Judicial Conference of the United States, 13 F. R. D. 62, 66	64
Report of Hearings before Subcommittee of Select Comittee on Small Business, United States Senate [83d Congress, First Session] Motion Picture Distribution Trade Practices [1953] p. 664	34

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PARAMOUNT FILM DISTRIBUTING CORPORATION ET AL.,
Respondents.

BRIEF FOR RESPONDENT DISTRIBUTORS.*

QUESTIONS PRESENTED.

1. Whether the operator of a first-run motion picture theatre has a right to recover treble damages from a film distributor because of an agreement whereby two other first-run exhibitors refrained from seeking some of the distributor's first-run product, where (1) the distributor does not complain of that agreement, the plaintiff exhibitor chose not to participate in that agreement, and, as a non-participant, received the fullest opportunity to and did in fact compete successfully for first-run product; and (2) there was no adverse impact on the plaintiff exhibitor's business.

* Metro-Goldwyn-Mayer, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Paramount Film Distributing Corporation and Warner Bros. Pictures Distributing Corporation.

2. Whether petitioner introduced any evidence from which a jury could have determined damage to petitioner as the result of any agreement or agreements of the type referred to in Question 1, above.

3. Was an agreement of one distributor and one exhibitor, concerning the mechanics of post-bidding negotiations, in any way unlawful, and did it in any way adversely affect this petitioner?

4. Did the trial court err in excluding certain of petitioner's offers of proof, and did petitioner suffer prejudice from the exclusion of what it offered?

STATUTES INVOLVED.

The pertinent statutes are Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which latter section provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE.

The petitioner, Viking Theatre Corporation, seeks reversal of a judgment of the United States Court of Appeals for the Third Circuit which, in a unanimous opinion, affirmed the entry of a directed verdict in favor of respondents, seven film distributors [1] and three Philadelphia exhibitors.[2] This brief is submitted on behalf of each respondent distributor except Twentieth Century-Fox Film Corporation, whose separate brief has been filed with this Court.

The verdict below was not summarily entered. It followed extensive pre-trial—seven conferences with the Court, depositions of over thirty witnesses, searching interrogatories, inspection of thousands of documents—and ten successive weeks of trial during which petitioner sought to present a case which would justify submission to the jury. The verdict was based on the District Court's determination that the evidence did not warrant a finding either that the respondents had unlawfully conspired, or that their conduct had injured the Viking Theatre (R. 2350-51).

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1. Metro-Goldwyn-Mayer (hereinafter "MGM"; also known as "Loew's"), Columbia Pictures Corporation ("Columbia"), United Artists Corporation ("United Artists"), Universal Film Exchanges, Inc. ("Universal"), Paramount Film Distributing Corporation ("Paramount"), Warner Bros. Pictures Distributing Corp. ("Warner"), and Twentieth Century-Fox Film Corporation ("20th Century-Fox").

RKO Teleradio Pictures, Inc. ("RKO"), originally named as a defendant, received a directed verdict in its favor on July 17, 1961 (R. 1985-87), and no appeal was taken.

2. William Goldman Theatres, Inc. ("Goldman"), Stanley Company of America and Stanley Warner Management Corporation (jointly called "Stanley Warner"), and the Fox Philadelphia Building, Inc. ("Fox Philadelphia").

In this Court, petitioner presents a case which is fundamentally different from the one which it tried in the District Court. As litigation moves through its trial and appellate stages, a refinement of argument and issues is inevitable, but its essential elements—the material facts and the decisive legal questions—remain. Here, those elements have changed, and some understanding of how they have changed is important to analysis of the case now offered for determination.

In the trial court, petitioner's major effort was an attempt to establish the primary contention that each of the distributors consistently rejected Viking's superior bids in favor of inferior offers from respondent exhibitors. The great mass of petitioner's evidence was devoted to this contention; it was the theme of the trial, about which other issues clustered only peripherally and intermittently. This contention has now been abandoned—the relevant conclusions of the Court of Appeals have not been challenged—and in consequence, the great bulk of the record has become irrelevant.

Together with its central claim that its superior bids were routinely rejected, petitioner tried to prove a number of other discriminations as further circumstantial evidence of conspiracy. The claims concerning most of these also have been abandoned, and the few which remain are no longer characterized as *proof* of conspiracy, but merely as *effects* of a conspiracy independently established by nothing more than the existence of the splits.

Petitioner presents this Court with a case which is founded on contentions which, in the early stages of this litigation, it expressly disavowed: the contentions first, that "splits" are illegal *per se*—automatic and irrefutable proof

of an unlawful conspiracy to allocate product [3]—and second, that splits resulted in monopolization by the respondent exhibitors.[4]

With this shift of position, petitioner necessarily retreats from the record. Its ultimate legal theory of *per se* illegality is presented in a factual vacuum. The abundant evidence in the record concerning the actual effect of the splits upon the distribution of product is ignored. Petitioner's case is now an *a priori* analysis founded on premises contradicted by the record.

Against this background, we turn to a statement of the relevant facts.

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3. The Fourth Pre-Trial Order reads in part:

> "* * * It is understood that the allegation that the above splits were illegal per se is presently to be treated as abandoned and no longer an issue in the case." (R. 30)

Later, during trial, petitioner's trial counsel emphatically confirmed the positon of prior counsel (R. 107).

The claim that splits were *per se* illegal was later resurrected, and in the Court of Appeals petitioner characterized splits as "direct proof of conspiracy"; but even there, as the Court of Appeals' opinion shows (R. 2767, 2780-89), its principal case was based on the assertion that circumstantial evidence showed discrimination against the Viking Theatre from which conspiracy might be inferred.

4. In pre-trial hearings for the formulation of special interrogatories posing the factual issues for ultimate submission to the jury, petitioner's counsel expressly withdrew any issue of monopolization:

> "MR. KOHN: I think it may shorten the work of opposing counsel as well as ourselves and the Court, and may also help to bring this matter to a head more promptly.
>
> First of all, we will acquiesce in their [defendants'] request to strike out [from the proposed interrogatories to the jury]—Or monopolize any part of interstate commerce. So that no brief will be necessary at any time on that particular issue." Transcript of Pre-Trial hearing of September 1, 1960, p. 56.

"Monopolization" was never again mentioned until the case reached this Court. Section 2 of the Sherman Act was not mentioned in petitioner's brief in the Court of Appeals, and that Court's opinion—reflecting the case presented to it—refers only to 15 U. S. C. § 1 (R. 2767).

1. Viking's Entry Into the Competitive Market.

Early in the 1950's, the impact of television on the motion picture industry became pronounced. Theatre attendance and motion picture production sharply decreased. Many first-run theatres failed.[5]

Faced with a declining market, respondent Stanley Warner was driven to extreme measures with respect to its first-run Philadelphia theatres: it closed the Earle and Aldine, withdrew the Boyd from first-run exhibition by converting it to Cinerama, and ultimately razed its largest theatre, the 4300-seat Mastbaum (R. 92, 94, 95, 1470).

The Aldine, believed by the distributors to be inferior to its competitors, was closed in 1953 (R. 94-95, 123-24, 1495-96, 1516-17, 1596-98). After many months, it was purchased by Harry Sley, operator of Sley System Garages (R. 1293-94). Sley remodeled the Aldine and opened it as the Viking on July 2, 1954. The period in suit extends from that date through November 13, 1956.

Throughout that period, twelve theatres were competing for pictures for first-run exhibition in Philadelphia: the Midtown, Goldman and Randolph, operated by respondent Goldman; the Stanley, Mastbaum and Stanton, operated by respondent Stanley Warner; the Fox, operated by respondent Fox Philadelphia; the Arcadia, Trans-Lux, Studio and World, each operated by a non-respondent exhibitor, and the Viking. The Viking, despite the inexperience of Harry Sley and Jay Wren (who became the Viking's general manager early in 1955),[6] and despite what it describes, with contempt for the record, as an "alloca-

5. 92-95, 905-07, 932-33, 1594-95.

6. Neither Sley nor Wren had any experience in first-run exhibition, or in bidding for first-run films (R. 311, 1276, 1497).

tion" of product among the respondent exhibitors (Br., p. 6), had full opportunity to license and did license and exhibit pictures first-run throughout the period in suit.

2. The Licensing of Films First-Run to the Viking.

On April 8, 1954, the Viking introduced itself to each distributor (except MGM, with which it already was negotiating) by formal lawyer's letters to each, demanding product.[7]

In its first year of operation, Viking developed a close relationship with MGM, one of the top distributors. It exhibited MGM pictures almost exclusively (R. 379-81, 1515-16). The relationship ended only when Viking, in a dispute with MGM over the expenses of advertising at Sley's parking lots, refused to pay film rental. Ultimately, MGM brought suit.[8]

Viking then turned to United Artists, a distributor which for the previous full year it had virtually ignored. United Artists responded by licensing to Viking a series of pictures, among them NOT AS A STRANGER, which had a higher national film rental than any United Artists picture awarded to a respondent exhibitor during the entire period in suit.[9] Viking refused for six months to pay the contractual film rental for that picture. Finally, in order to recover film rental due, without litigation, United Artists adjusted (*i.e.*, reduced) the rental (R. 49-51, 489-99, 2290-93).

Thereafter, Viking sought LUCY GALLANT from Paramount. Having had no experience with Viking (R. 1294-

7. Petitioner often handled routine business matters in consultation with its counsel (R. 597, 598-601, 610-11, 656-59, 1506-07).

8. R. 1516-17, 160-61, 299, 625, 1514-15, 1515-17.

9. National film rental, the amount which a picture earns from nationwide exhibition, is the criterion adopted by petitioner for measuring the quality of any given picture (Br., p. 15).

97), Paramount nevertheless accepted a Viking offer (later conceded to have been "bad", R. 436, 638-39) requiring Paramount to pay all advertising costs. Paramount paid $7,344 for advertising, received $4,057 in film rental, and incurred a net loss of over $3,000 (R. 435-36, 2646).

Viking licensed four pictures from Universal in the fall of 1955; played them from December to March, 1956; and then refused to pay the film rental. Universal offered a $15,000 adjustment, but Viking rejected it and demanded more. Universal was compelled to sue for its film rental and recovered in full (R. 500, 699-701).

In April, 1956, Twentieth Century-Fox accepted Viking's offer of $106,500 for MAN IN THE GREY FLANNEL SUIT, turning down a $100,000 cash guarantee offered by the non-respondent Trans-Lux Theatre. Viking refused to pay $28,000 of the rental due, and Twentieth Century-Fox was compelled to sue for collection. Ultimately the rental was paid in full (R. 467-68, 716-20).

Despite these and similar incidents,[10] every one of the distributors continued to offer Viking the opportunity to obtain each first-run film released. By the end of the period in suit, Viking had licensed 37 first-run motion pictures, 25 by negotiation, 12 on formal bids, and had exhibited 34 of them. It had been awarded pictures first-run by each distributor (R. 827-28, 859-62, 1405-12, 2644-48). Competing against 11 first-run theatres, *including* those of the

10. Viking repeatedly demonstrated a contemptuous, truculent attitude toward distributor personnel. For example, see R. 693-704, 599-604, 655-62 (refusal to make offers unless specially treated); R. 312-16, 319, 323-24, 325-26, 338-42, 717 (refusal to reply to correspondence, or sarcastic response); R. 591-97 (waiting until bid time had expired and then complaining about procedure); R. 613-16 (insisting on preferred treatment on negotiation); and R. 823-26 (demanding screening of pictures it could not use).

respondent exhibitors, Viking licensed approximately half of the pictures which it sought. The average quality of the films it showed, based on its own criterion of national film rental, surpassed the quality of the pictures shown at Goldman's Midtown, concededly the most comparable theatre to the Viking in size and appointments (R. 894-95, 1511). Viking's films also surpassed the quality of the pictures obtained by the Stanton and Goldman theatres (R. 895-96, 850-57)—the only other theatres of respondent exhibitors remotely comparable in size to Viking (all others are two, three or four times larger) (R. 2642). And there is neither evidence nor offered evidence that Viking paid more for the product of any distributor than did *any* of its competitors (see pp. 42-46, *infra*).

Petitioner apparently interprets the injunction of **Continental Ore Co. v. Union Carbide & Carbon Corp.**, 370 U. S. 690, 699 (1962) to consider each case "as a whole", as a license to ignore the fact that the respondent distributors are not one entity but separate individual companies. By referring constantly to "the distributors", by disregarding the evidence relating to particular distributors, and by suppressing the factual history of the distinctly separate dealings of each distributor with the Viking, petitioner attempts to bypass the right of a defendant to a decision based on the evidence concerning its own conduct. Petitioner has abandoned the claim of a conspiratorial pattern of similar conduct—discredited by the Court of Appeals' analysis of the evidence (R. 2780-89)—but the theory which it now substitutes for the abandoned factual case is just as inconsistent with the record facts concerning each distributor.

If, as petitioner asserts, unreasonable competitive restraints are inherent in the splits and can be demonstrated "syllogistically" through such concepts as "sub-markets", "latent discriminatory power" and "near monopoly"

(Petitioner's Brief, pp. 13, 14, 20, 22, 26, 36, 43), the observable effects would have to be at least *consistent* with petitioner's "syllogistic" conclusions, and would be applicable to *each* distributor whose product was subject to a split. Analysis of the actual facts concerning each distributor, however, does not confirm, but completely refutes, the premises, conclusions and logic of petitioner's theoretical exposition.

A. *Viking's Dealings with Metro-Goldwyn-Mayer.*

In 1951, long before Harry Sley purchased the Viking Theatre, MGM was asked to agree to "split" its product (R. 1633-34). The word "split", a term of art in the motion picture industry, refers to an agreement by exhibitors that each will seek to license only a portion of a given distributor's pictures—with the distributor retaining absolute freedom to license any picture to any other exhibitor, and to withdraw its consent at any time (R. 100-03, 1638-39, 2237-39, 2295).

MGM agreed to a split of its product, and the agreement had been in effect three years when Viking opened in 1954. Even before it opened, Viking obtained MGM's JULIUS CAESAR for its first attraction. When it failed to open on schedule, MGM voluntarily released Viking from all obligation on the picture (R. 500-501, 1506). In June, 1954, for its delayed opening, Viking licensed MGM's STUDENT PRINCE. Thereafter, for one full year, Viking, in active competition with the other first-run Philadelphia exhibitors—including respondents Goldman and Stanley Warner—licensed nine of the ten MGM films it sought. The tenth went to the non-respondent Arcadia (R. 2644-48, 379-81, 1367-68, 1510-11, 1520-21). These pictures were well above average quality (R. 42-44).

Viking's general manager, Wren, raised a dispute about advertising payments, and in June, 1955, Viking

refused to pay part of the rental on two of the nine MGM films it had exhibited (R. 161-62, 624-26). Thereafter, for one full year—September, 1955 to September, 1956—Viking showed no interest in MGM product, voluntarily passing up major MGM releases (R. 383, 386-87). Wren testified that ignoring this major source of product did not "bother" the Viking at all (R. 380-87).

Throughout the two and one-half year period in suit, MGM distributed 57 pictures (R. 42-44). Viking made offers for 19, and was licensed ten—which comprise approximately one-third of its programs throughout the period (R. 28-29; R. 2644-48). Of the nine MGM films which the Viking sought *unsuccessfully*, it withdrew its offer on one (R. 259); five were awarded to non-respondent exhibitors; and only the remaining three went to any of the six theatres operated by Stanley Warner or Goldman (R. 371, 380-81).

The contention that the split of MGM product between Stanley Warner and Goldman "allocated" MGM pictures to these exhibitors, or restrained Viking's ability to compete for them effectively is ridiculous. And many vital premises *assumed* in petitioner's theory[11] are simply inconsistent with the facts respecting MGM films:

(1) Obviously, Viking did not "receive fewer pictures" (Petitioner's Brief, p. 38) from MGM; there was no deprivation of product.

(2) The contention that Viking "had to pay" more for its films because it "had to offer guarantees" (Brief, pp. 19, 26) is directly contradicted by Sley's own testimony concerning his offers for MGM films (R. 1536-38). Sley attempted to show that the film rental guarantees he

11. Petitioner's theory as to how splits could have injured Viking is fully considered in the argument, pp. 30-49, *infra*.

offered were calculated so shrewdly that they nearly matched "earned film rental", *i.e.*, film rental which *accrued* to the distributor, on a percentage basis, from actual box office performance.[12] Viking's guarantees reflect nothing more than its own estimate of what a picture would actually earn.

(3) Petitioner's theory that it "had to play [films] longer than any of the respondent exhibitors" (Brief, p. 38) is flatly contradicted by the facts as to MGM; MGM granted every reduction in playing time which Viking requested (on four of the ten MGM pictures it played, R. 480-83, 485-86, 486-88).

(4) Viking also received a film rental reduction (from 40% to 25%) on an MGM film (R. 499-500). Hence, it received a total of five adjustments on the ten MGM pictures which it licensed. The claim that "the distributors" discriminated in denying adjustments to Viking—in rigidly holding Viking to its contractual terms (Brief, p. 16)—is absurd as to MGM.

There is nothing from the first to the last page of this record to suggest that with respect to MGM, the first distributor to agree to a split of its product in Philadelphia, with more of its films split than any other distributor, Viking suffered even *one* of the alleged restraints which it says flow "syllogistically" from the existence of splits.

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12 Viking's counsel explained the purpose of Sley's testimony:

"MR. SAWYER: I offer to prove, Your Honor, by taking all of the motion pictures that were exhibited at the Viking during the time that Mr. Sley had personal charge of the matter, and before Mr. Wren's coming in to formulate the bids, that the guarantees offered by Mr. Sley most closely approximated the earned film rental to indicate Mr. Sley's ability and knowledgability, his ability to estimate well what the performance of a picture would be; to show, in other words, his ability as a motion picture operator." (R. 1537)

B. *Viking's Dealings with Columbia.*

Columbia offered all its product to Viking on the basis of negotiation rather than through bidding (R. 2217-18). During the period in suit, Columbia distributed 70 pictures. Viking showed interest in only four, and was awarded one which it exhibited after the period in suit (R. 349-50, 1508-09).

Viking's claim of unfairness in the acceptance of its competitors' offers for three Columbia pictures—which were not even subject to a split (R. 2361-62)—has been abandoned in this Court, and since Viking never played a Columbia picture during the relevant period, literally nothing remains in this case concerning this distributor. All of the theoretical grievances in petitioner's brief respecting splits, film rentals, adjustments, guarantees and the like, are obviously inapplicable to Columbia, whose films Viking never played because it simply had no interest in Columbia's product. Indeed, Columbia is scarcely mentioned in the 52 pages of petitioner's brief.

C. *Viking's Dealings with United Artists.*

Viking, given an opportunity to license each of the 55 United Artists' pictures distributed during the period in suit, competed for 17 United Artists' films, and was awarded 11—eight by negotiation and three by bidding.[13] And United Artists, like MGM, had agreed to a split of its product (R. 128, 2237-39).

Of the six United Artists' pictures Viking sought but did not obtain, Goldman, with its three theatres, licensed three, and Stanley Warner, with three theatres, licensed

13. R. 49-51, 387-89, 2277, 2295, 2298.

two (R. 2299, 896-99). One of these six (TRAPEZE, R. 51), the picture which had the highest national film rental of any released by United Artists during the period, went not to a respondent exhibitor, but to the Trans-Lux (R. 388-89). And United Artists' second most successful film (NOT AS A STRANGER) was licensed to the Viking itself.[14] Viking's lament (Brief, p. 25) about the quality of the product it licensed from "the distributors" flies in the face of the *fact* that the average national film rental of its United Artists' product was $1,400,000, contrasted with an average of $950,000 for the United Artists' pictures played by all other theatres first-run in Philadelphia (R. 40, 49-51). These facts show the contrast between the postulated "dominant market position and monopoly power" of respondent exhibitors asserted by petitioner (Brief, p. 36), and the competitive realities of the Philadelphia market.

Almost two-thirds of the total film rental Viking paid to United Artists is attributable to a single picture, NOT AS A STRANGER (EX. P. 176; R. 2646). Viking paid United Artists 57% of its gross receipts ($95,524) in film rental for NOT AS A STRANGER (R. 2646), an amount commensurate in percentage of gross receipts (but *less* in dollars) than that which the respondent exhibitors paid for equally outstanding films.[15] And Viking paid an average of only 38% on all the other United Artists' films it showed—less than any norm which we can discern petitioner to be urging as appropriate to the Viking Theatre (see Brief, p. 27).

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14. TRAPEZE and NOT AS A STRANGER each earned $2,000,000 more in national film rental than any other United Artists' film released during the period (R. 49-51).

15. Viking's 57% of gross receipts paid for NOT AS A STRANGER appears in perspective when we consider that Goldman's Midtown paid 62% of its gross receipts ($151,661) for Paramount's COUNTRY GIRL (R. 1033) and Randolph paid 61% ($145,900) for Columbia's CAINE MUTINY (R. 1150), both outstanding attractions comparable to NOT AS A STRANGER (R. 41-54).

Petitioner's theory that lower quality product and higher costs necessarily followed from splits is irreconcilable with the evidence of Viking's actual dealings with United Artists.

D. *Viking's Dealings with Paramount.*

Paramount offered Viking and every other exhibitor opportunities to license its pictures throughout the period by competitive bidding. Paramount distributed 38 pictures first-run in Philadelphia. Viking, competing as always with eleven other theatres, made offers for 13, and was awarded two (R. 41-42, 645-49, 1978-80). Of these two Viking exhibited only one, LUCY GALLANT, during the period in suit. Since Viking no longer argues that Paramount's rejection of its offers was unfair or unreasonable,[16] the evidence relevant to petitioner's present claim against Paramount is reflected in their dealings for this one picture.[17]

Viking obtained LUCY GALLANT without offering a guarantee. Viking's exhibition of the film proved such a box-office disappointment that Paramount received no film rental for the third week of the run, and a total film rental of only 21% of the gross box-office receipts—although Paramount was at the same time obligated to pay all of Viking's advertising costs. Paramount sustained a net loss of more than $3,000. *Viking* admittedly made a profit (R. 435-36, 619-20, 1921-23, 2646).

This history of the only Paramount film exhibited by Viking shows the invalidity of petitioner's theory that, be-

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16. Petitioner's single reference to the award of a Paramount film (COUNTRY GIRL, Brief, pp. 19-20), is an unwarranted suggestion of some unfairness not to the Viking, but to the Trans-Lux. See pp. 24-25, *infra*.

17. Petitioner's contention that a "Schwalberg Agreement" existed between Paramount and Goldman (Brief, pp. 7-9) is considered at pp. 54-59, *infra*.

cause of the splits, it "had to pay" higher film rentals, "had to" offer guarantees, and was improperly denied adjustments by "the distributors".

E. *Viking's Dealings with Universal.*

Universal preferred not to solicit bids. Instead, it invited Viking and every other first-run exhibitor to negotiate for films (R. 678). During the period, Universal distributed 65 pictures. For the first half of the period in suit, Viking's only attempt to license Universal product was a tentative offer, withdrawn when Viking was able to obtain a better picture (R. 51-53, 454-56, 462). During the entire period, Viking showed interest in only six Universal films, and was awarded four (R. 271, 454, 674-75, 697). The average national film rental of these four pictures was $1,400,000 as contrasted with an average of $1,150,000 for all Universal product played first-run Philadelphia during the period (R. 51-53).

Viking's contention that "the distributors" deprived it of film rental adjustments has no relation to the facts concerning the other respondent distributors; but with Universal, a complaint about adjustments is all of Viking's grievance. Petitioner's variously-characterized charges against Universal (high film rentals, block booking, required guarantees, Brief, pp. 17-19) all reduce to a single issue (see p. 23, *infra*)—Universal's treatment of Viking's request for an adjustment on the four Universal pictures licensed in September, 1955.

Universal did offer the Viking a $15,000 adjustment in film rental on those pictures—the largest adjustment figure which Universal offered during the period (R. 500, 2603-04). Wren flatly rejected the offer (R. 500). Later, Wren asked Universal to renew the offer, and his request was refused (R. 303). Petitioner's characterization of Uni-

versal's offer as "a reward for not bringing the instant action" (Brief, p. 19, footnote 7) is simply false. Universal's offer and Viking's rejection of it *preceded* any knowledge by Universal of this suit (R. 500, 303).

F. *Viking's Dealings with Warner Bros.*

When Viking entered the market, Warner unsuccessfully sought to negotiate with it for the licensing of two substantial pictures[18] (R. 158). Thereafter, Warner invited Viking's offers for all its pictures. Viking ignored the great majority of Warner's pictures, submitted bids for ten, and was awarded one (R. 46, 47, 741, 742, 817-18, 1061, 1063-4, 1795-6). The claim that Warner's awards of the other nine were unreasonable—a claim found unsupported by the Court of Appeals—is not pressed here; and Warner's BABY DOLL, which Viking licensed in the face of a competitive bid from Goldman, was exhibited after the period in suit (R. 1791; Ex. P. 176; R. 2644-48). None of the complaints about film rental adjustments or similar matters now advanced in petitioner's theory can have any relationship to Viking's dealings with Warner.

In reviewing the evidence respecting each distributor, we have been mindful that petitioner has treated "the distributors" as an indivisible unit, with a theory which postulates certain anti-competitive results as following inexorably from the one factor claimed to be common to each—the split of its product. We have not treated the facts as to each distributor separately to avoid petitioner's theory, but to refute it. The facts demonstrate that the postulated results did not occur in the case of *any* distributor. Were petitioner's theory valid—were the splits in themselves a substantial competitive restraint—the effects would appear with respect to each distributor whose product was

18. SILVER CHALICE and YOUNG AT HEART, both with a national film rental of approximately $2,000,000 (R. 46).

split.[19] Their failure to appear in even one case would destroy the logic of the theory. Here the postulated results appeared in no case.

3. The Splits of Product in First-Run Philadelphia.

Splits are frequently utilized in connection with the licensing of motion pictures (R. 2775). While splits vary in the number of pictures involved, the number of exhibitors involved, and in procedural detail, they are essentially agreements between exhibitors, with the distributor's consent, terminable at will, that each exhibitor will refrain from bidding or negotiating for specified pictures of that distributor. Where more than two exhibitors are involved, they may all participate in the split, or some may elect to retain their freedom to compete for *all* the distributor's product. As for the distributor, it makes no commitment and continues to offer its product to all exhibitors as if no split existed. From the distributor's point of view, the practical result is the same as if one exhibitor had simply chosen to pass up a particular picture for any reason (R. 1638-39, 1734-35, 2237, 2295).[20]

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19. The case of distributor RKO, whose dismissal (R. 1985-87) has not been appealed, further demonstrates the invalidity of Viking's theory. RKO was concededly party to a split, so that Viking's postulated restraints would apply to it as much as to any respondent. Yet the evidence, developed in a startling but conclusive manner (R. 337-42), showed that the magical tri-section of Viking's bargaining position (Brief, p. 14) left it cool—indeed hostile—to RKO's efforts to sell product which the supposedly "dominant" respondent exhibitors could not afford to disdain. And petitioner's theory, boldly stated but belied by the facts, purports to find support in a few raw figures so crudely massed that they cannot be separated with reference to *any* distributor, including RKO, who, despite its unappealed dismissal, still haunts petitioner's statistics. (See pp. 22, 53, *infra*.)

20. While we discuss "splits" generally, here and in argument, the evidence concerning splits varies from distributor to distributor. The films of Twentieth Century-Fox, for example, were never split between Goldman and Stanley Warner (R. 115-16); and while there is evidence of discussions between these exhibitors and Columbia concerning the possibility of splitting Columbia's product, the record shows that the parties never reached agreement and no over-all split of Columbia films existed (R. 127, 2223-4). A similar situation prevailed concerning the product of Universal (R. 127-28).

The splits by Stanley Warner and Goldman of the product of the respective distributors came into effect at different times in the years following 1951 (R. 115, 125-28).[21] The existence of splits between Goldman and Stanley Warner did not deny any exhibitor the opportunity to license every picture released in Philadelphia (R. 114, 125, 145, 1911-12, 2237). In fact during these years new first-run theatres entered the competition. Each film was offered to each exhibitor; the only effect of the splits was that Stanley Warner and Goldman rarely bid for the same picture, and Viking and the other exhibitors rarely faced the competition of *both* Stanley Warner and Goldman for a given picture (R. 101-03, 114-115, 125, 145-6, 1735)[22]

The split participants were not assured of any films by virtue of a split; they were often unsuccessful in obtaining pictures which were split; and Viking was strikingly successful in licensing pictures from the splits. Viking licensed a greater percentage of pictures listed on splits, for which it made offers, than did either Stanley Warner or Goldman. Forty-eight of the 87 pictures sought by the Viking were split. Of those 48, Stanley Warner got 12 for its three theatres, Goldman licensed 14 for its three theatres, Viking was awarded 17, and 5 pictures went to the non-respondent Arcadia and Trans-Lux (R. 1620-25; Ex. P. 1; R. 2355-81). For its three theatres, Stanley Warner got four pictures

21. We have not dealt with plaintiff's contention that defendant Fox Philadelphia was somehow involved in splitting by virtue of the fact that it sought primarily Twentieth Century-Fox product. This is dealt with in the brief of those respondents; and the contention has nothing to do with the distributor respondents herein represented—whom petitioner does not even charge with participation in any alleged arrangement involving the Fox Theatre—and whose product was available to the Fox Theatre throughout the period.

22. The Court of Appeals concluded:

> "The evidence affirmatively shows that every exhibitor was afforded the opportunity to bid or negotiate for the pictures of each distributor; in fact, many of the pictures listed on the split were licensed to non-defendant first-run theatres, including the plaintiff." (R. 2776)

apiece; for its three theatres Goldman got five pictures apiece, and for its *one house* Viking got 17 pictures.

Viking apparently recognized its own competitive advantage in being free to seek one hundred percent of each distributor's product, while the splits removed Stanley Warner or Goldman as Viking's competitor for certain pictures. Viking offered nothing even to suggest that it or any exhibitor was foreclosed from participation in the splits; admittedly Viking made no attempt whatever to participate; and indeed the record strongly indicates that Viking, on at least two occasions, declined invitations to participate (R. 105, 114-15, 120, 731-40, 1923-25).

4. The Alleged "Discriminatory Practices".

Several claims of discrimination were made in the courts below. A few have been renewed (Br., pp. 15-24), but these "discriminations" are no longer urged as proof of a conspiracy. They are now called "effects" of a conspiracy which "was complete when the distributors agreed to institute the split system" (Br., p. 40). Proceeding from its gratuitous conclusion that splits conferred monopoly power, petitioner opens its discussion of "discriminatory practices" with the statement that the distributors, faced by exhibitors whom the splits had transformed into monopolists, "could be expected to discriminate" in favor of the alleged monopolists and against the Viking (Br., p. 15).

There is neither evidence nor offered proof of *any* discrimination; nor is there any logic which might establish a causal relation between the conduct alleged and the existence of the splits.

It is said (Br., p. 16) that the distributors "discriminated in favor of the respondent exhibitors" in granting

film rental adjustments. An adjustment is a reduction in terms to which a distributor may agree voluntarily after a film is unsuccessful at the box office (R. 298, 481-82).[23] In support of the claim, petitioner gives us some figures from an excluded offer of proof—a total of alleged adjustments to Goldman, Stanley Warner, and Fox—and the statement that Viking got rental adjustments on only two first-run pictures.

Viking was offered adjustments on 11 of the 33 pictures it licensed from respondent distributors: seven film rental reductions, and four reductions in playing time (R. 479-502). And in dollars and cents, Viking was offered *more* in rental adjustments than were several of the theatres of respondent exhibitors.[24] The adjustments taken by Viking were $3,362 (WIZARD OF OZ, $1,336, R. 299-300; NOT AS A STRANGER, $1,040, R. 490-92; and DESERT SANDS, $986, R. 499). And Viking was offered and rejected an additional adjustment of $15,000 by Universal (R. 500). Separated by theatre, the figures show (once the $15,000 adjustment offered by Universal is included) that the Midtown—concededly the theatre most comparable in size to the Viking (R. 357, 395-96, 1511)—received approximately $1,000 *less* in rental adjustments than did Viking; the Mastbaum received about $3,000 less, and the Stanton $13,000 less (R. 1049-50). Of course, realistically, disparity and not equality is to be expected, in view of the variables inherent in the granting of adjustments. Indeed,

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23. A distributor may consider, for example, the degree of exhibitor interest in the picture before it was licensed, the competitive offers made for the film, the picture's general performance in other markets, the extent of its own misjudgment as well as the exhibitor's, the extent of the exhibitor's loss, the amount of the distributor's profit (R. 479, 1571-72, 1913-18).

24. Petitioner's offer of proof contains dollar amounts (R. 1049), which, however, incorrectly reflect the amount of Viking's adjustments. The correct figure is shown in the text which follows.

it is remarkable that there is a rough equality between Viking's adjustments and those granted to any other theatre.

The defect in the offered proof goes beyond mere misstatement of figures. There is nothing offered *but* figures: nothing to show which distributors offered which adjustments, whether some offered many, others none, or very few (even those granted by the non-respondent RKO are included); nothing to show that any adjustments were withheld from Viking which, *under similar circumstances*, would have been given to Goldman or Stanley Warner. Discrimination can exist only if disparate treatment is given in like circumstances—and the circumstances which govern a decision to adjust film rental vary widely.[25] And in any event, since it is not even suggested by petitioner that the distributors acted in concert in developing and implementing their respective policies concerning adjustments, inquiry into statistics collecting the number of adjustments granted or denied by "the distributors" is an academic exercise.

The complaint about playing time adjustments has no substance at all. Petitioner cites a fragment of testimony relating to Goldman's holdover policy at one theatre[26] as evidence of the "typical" practice of Goldman *and* Stanley Warner to break playing time commitments (Br., p. 17). It asserts, without any citation to the record, that "the distributors always submitted" (Br., p. 17); and then, to show that Viking was by contrast *harshly* treated, petitioner refers to three occasions when Viking was sued—*not* for the breach of a playing time commitment, but for an arbitrary refusal to pay substantial film rental. There is

25. The evidence on which petitioner relies to support its film rental adjustment grievance derives from this rejected offer of proof, which was incompetent for many reasons. See pp. 60-61, *infra*.

26. A "holdover figure" in film parlance is the amount of gross receipts in one week which will require the exhibitor to hold the picture over for a subsequent week.

no evidence that Viking was ever refused an adjustment in playing time; and in fact on four occasions Viking itself cut short a run without being sued (R. 480-83, 485-88).

Viking claims (Br., p. 17) that Universal required it to license three unwanted pictures, to obtain a fourth. Wren testified that he was interested in all four pictures (R. 665-66); Viking's counsel informed the trial judge that "There isn't anything about block booking in this case" (R. 109); and the pages of the record which Viking cites to support the claim, refute it (R. 205-210). Wren testified at length about how he and Dana of Universal negotiated: Viking asked about one picture, Dana suggested three others. After several hours of negotiation, Wren was sold on the value of all four. Dana reduced his original asking price of $130,000 to a series of individual prices totalling only $85,000. Wren's grievance was not about block booking at all, but that Dana had promised to make an adjustment if the pictures were unsuccessful, and then offered "only" $15,000—the largest adjustment Universal offered to any exhibitor during the period (R. 205-210; R. 500). The indefensible suggestion that Universal's offer was less than *bona fide* has already been discussed (pp. 16-17, *supra*).

Petitioner says (Br., p. 19) that Viking "had to offer" cash guarantees on a number of its films. Goldman, it says, "was required to offer" only one such guarantee, for COUNTRY GIRL. A guarantee is a promised minimum film rental. It may or may not be part of an exhibitor's offer. Viking did not "have to offer" *any* guarantees; and those which it made, by its own admission, reflected its own business judgment, nothing more.[27] Goldman believed that his terms were attractive enough without cash guarantees, and did not make them; but his alleged "co-monopolists",

27. R. 362, 468, 587-88, 1129, 1536-38, 2191.

Stanley Warner and Fox, made a great many—a fact in itself completely inconsistent with Viking's premise.[28]

Goldman preferred to make offers which guaranteed a fixed minimum percentage of gross receipts, and payment of specified advertising costs (leaving Goldman no assurance that his overhead expenses would be covered), but without a *cash* guarantee. This was his right. Viking preferred to make offers which did not guarantee the distributor a fixed percentage of gross receipts and which did assure Viking its overhead and advertising expenses—and attempted to compensate for these less attractive terms with a cash guarantee.[29] This was its right. The distributor wanted to get the maximum film rental. That was its right. Each distributor had to and did evaluate each offer on its merits. The fact that Viking offered more cash guarantees than Goldman proves nothing. The bare number of cash guarantees is meaningless.

Petitioner's remarks about guarantees appear in their context merely as a convenient opening for a discussion of COUNTRY GIRL, yet the actual facts about COUNTRY GIRL lack even superficial relevance to any claim of discrimination. All bids were rejected on the first round because Paramount insisted on a play date coinciding with the Academy Award nominations. The original offers had not assured this date (R. 1226-28, 1873-76). On the second round, Goldman's Midtown bid a written guarantee of $75,000, *and* agreed to the play date. Viking offered a $60,000 guarantee, without the play date. And Viking proposed a ten week run, contrasted with the Midtown's "indefinite" run (R. 1032-33, 1873-74). Wren conceded that Goldman's offer was superior (R. 1223-24, 1226-27), and that the Midtown deserved the award (R. 1234).

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28. *E.g.* R. 1093, 1210, 1216, 1928, 2586, 2617, 2753-54.

29. Wren admitted that the percentage terms he frequently offered represented a "bad deal" for the distributor unless buttressed by a guarantee (R. 636-7).

Still, petitioner suggests that Goldman got COUNTRY GIRL unfairly. Perhaps it relies on its sly suggestion that Goldman knew the amount of the Trans-Lux guarantee, and so could match it (Br., p. 20). But even this whisper of favoritism cannot be supported. Goldman was not, as petitioner asserts, "unable to explain" the amount of his guarantee. He was not asked to explain it (R. 1707).[30] And Goldman's initial $75,000 guarantee was made *before* the Trans-Lux offered that amount (R. 1901).

Here again is an indefensible misuse of the record, characteristic of the petitioner's claims of "discrimination". "Discrimination" means that different treatment is accorded in equivalent circumstances. The evidence fails to show a disparity of treatment in similar situations; and if such disparate treatment were shown, it would still lack relevance here. It is not presented here as proof of conspiracy—conspiracy is now said to have been "complete when the distributors agreed to institute the split system among the respondent exhibitors" (Br., p. 40). Its current use is to illustrate "effects" of splits (*Id.*). These "effects" simply lack a causal relationship to the splits, and this obvious fact was admitted by Viking's counsel:

> "MR. SAWYER: But I didn't try in any way, nor do I, to allege, Your Honor, that the split per se, itself, the agreement that these two chains won't compete, is a part of or that thereby the distributors have also agreed to discriminate against the Viking.
>
> "Now we say that they did, but that doesn't necessarily follow from the split, and I certainly didn't suggest that with this witness. * * *" (R. 107)

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30. Petitioner's record citation (R. 1870) purporting to show *Goldman's* inability to explain leads surprisingly not to Goldman's testimony but to Paramount's Howard Minsky, who merely confirmed the amount of the Trans-Lux guarantee.

SUMMARY OF ARGUMENT.

The deceptively simple fact that the Viking Theatre might have participated in the splits, but chose not to participate, brings sharply into focus the conclusion, inevitable on this record, that Viking was not adversely affected by the splits. Viking had no reason to seek participation in the splits because by joining in them, Viking could have obtained nothing more than it already had. The Viking and every other first-run exhibitor in Philadelphia had an unfettered opportunity to license every film of every distributor at any time during the period in suit. Because each of the split participants refrained from seeking certain pictures, the Viking Theatre faced less competition when it sought the pictures which had been split. And Viking obtained this patent competitive advantage without the corresponding disadvantage assumed by the split participants: Viking did not obligate itself to compete for less than the total available product.

Only distributors are even potentially threatened by splits, yet the Viking, an exhibitor, who was not and could not have been adversely affected by the splits, and who indeed was a beneficiary of the advantages which the splits conferred, is the *plaintiff* in this antitrust suit where the distributors are *defendants*.

The classic division-of-market cases on which petitioner relies in urging that the splits are inherently illegal would be pertinent if petitioner were a *distributor*. If a distributor challenged a split of its product collusively made by exhibitors, without its consent, there might indeed be some analogy to the division-of-market cases. But when, as here, an exhibitor sues distributors for consenting to splits, purporting to rely on the division-of-market cases, it assumes a false position, because it is neither the actual nor the potential victim of any division-of-markets.

A distributor's consent to a split of its product, far from being illegal *per se*, is not conceivably even unlawful. In fact, its consent has *prima facie* legality: distributors' consent to splits (even to splits which include *all* exhibitors in a market, so that none compete with the others for a given motion picture) has been requested by the Antitrust Division of the Department of Justice, is consistent with the Department's long-standing attitude toward splits, and has been approved by the Court which was assigned to adjudicate all applications concerning the implementation of this Court's decision in **United States v. Paramount Pictures, Inc.**, 334 U. S. 131 (1948). A distributor, therefore, in consenting to a split, cannot be condemned for committing an inherently lawless act; and no distributor in this case can be held responsible in treble damages for having consented to these splits. A distributor properly exercises its own business judgment in deciding whether to offer only a portion of its films to exhibitors who want to split, or to insist upon their bidding against each other for every one of its pictures. Every exhibitor in the market in this case had every competitive advantage enjoyed by the split participants, so that none could have been injured by the existence of the splits.

Petitioner's claim that the splits in this case have implicit anti-competitive effects rests primarily on an *a priori* analysis of hypothetical "sub-markets" in first-run Philadelphia, an analysis grounded on a proposition which petitioner tried during weeks of trial to deny: the proposition that a theatre's competitive success is critically affected by its seating capacity. This analysis (never suggested in either court below) claims to demonstrate, syllogistically, that a split participant (at least one with a great many theatre seats) automatically becomes a monopolist when he limits himself to only a portion of the total product available. This analysis, like every theoretical premise

petitioner uses to build his case, is unrealistic and refuted by the facts.

The assertion that Viking "had to pay" higher prices for its films, because of the splits, rests not on evidence, but on two theories, and one small cluster of percentage-of-gross-receipts figures. The theories are unsound—their logic is faulty, they are contradicted by the facts—and the percentage figures are no indication whatever of the price which a theatre pays for films.

Petitioner cannot show that the splits in this case effected any substantial restraint upon competition. It cannot offer anything from which to conclude that the splits might have adversely affected it, or any exhibitor. Accordingly, its attempt to show actual private damage in this case must be, and clearly is, contrived. The "evidence" tendered by petitioner to show its alleged damage was nothing more than a schedule of statistics concerning box office receipts and film rentals paid by Viking and by theatres of respondent exhibitors. This schedule is a mathematical and logical mistake. It proves nothing except that bare figures can be properly used only if they have some relation to the facts.

Petitioner urges that an agreement (the "Schwalberg Agreement") between one distributor, Paramount, and one exhibitor, Goldman, constitutes a conspiracy which requires a reversal as to these respondents. Paramount's agreement with Goldman (never translated into practice) was that *if* Paramount rejected all bids on a given picture for their failure to meet its terms, it would then consider an offer from Goldman despite his failure to have bid, and would accept his offer if *it did* meet Paramount's terms (a pre-determined national standard). This was one distributor's solution to a problem with one exhibitor who refused to submit formal bids—a solution which gave him a

chance to submit his offer, but only if exhibitors who did submit formal bids had offered inacceptable terms. It had not even a potential for substantial market restraint, and in fact it had no impact on—or even any relationship to—the way Paramount actually licensed its product during the period in suit.

Petitioner claims that certain erroneous evidentiary rulings precluded its submission in evidence of material so critical that without it petitioner could not give "a coherent statement of the conspiracy". Yet petitioner has been free in this Court, as it was in the Court of Appeals, to set forth the excluded material exactly as if it had been admitted, and has, here and in the Court below, described in detail as much of that evidence as it deemed helpful. In this Court, it has relied upon evidence contained in only three rejected offers of proof—three of at least nine which it implies were of critical importance to its attempt to prove the existence of conspiracy—and the evidence in those three offers of proof (collections of figures, nothing more) is so plainly incompetent that no court which measures admissibility against the simple requirement that evidence be probative of that for which it is offered, would have admitted this material. It was not probative, nor has it any relation at all to the existence of the conspiracy which petitioner alleges—a conspiracy which it characterizes as "complete" when the splits came into effect. Petitioner's declamation that "The decision below rests on a theory of evidence which, if not exploded by this Court, could well spell an end to private antitrust suits" is typical of the gross overstatement and utter disdain for actual facts which characterizes and runs throughout its case.

Argument.

The complaint which launched this suit catalogued thirteen specific grievances against the respondents (R. 7-8). The splits—of which Viking was fully aware (R. 737-40)—were not mentioned.

Viking's manager, Jay Wren, testified for twenty trial days. His testimony covers over 3500 pages of the trial transcript. Not once in twenty days did Wren suggest to the trial court that splits by competing exhibitors injured the Viking Theatre. The splits themselves were not once mentioned in Wren's direct testimony. No evidence of any kind was offered of any injury to Viking as a result of splits. Thus, respondents had no opportunity to test by cross-examination any testimony asserting that splits in some way injured the Viking Theatre. Now this Court is told that the District Court erred in not concluding that the splits, in themselves, created monopoly power which destroyed Viking's ability to compete effectively.[31]

Petitioner's major claim in the trial court—that the respondents conspired to deprive it of films by consistently rejecting its superior bids—and peripheral claims of discrimination, account for the great bulk of this enormous record. The courts below held these claims to be without evidential support, and petitioner does not now challenge that conclusion. Instead, petitioner now conceives a case to which most of the record is irrelevant—a theory unencumbered by the evidence because it postulates its conclusions as following "syllogistically" from a single premise—the existence of splits in Philadelphia.

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31. We find no precedent for this Court's determination of a claim never raised in the trial court, never the subject of direct testimony by the complaining party, and which, as now presented, was never made in the Court of Appeals. See **Safeway Stores v. Oklahoma Retail Grocers Assn.**, 360 U. S. 334, 342 (1959), footnote 7.

I.

THE SPLITS IN FIRST-RUN PHILADELPHIA WERE LAWFUL AND DID NOT INJURE THE VIKING THEATRE.

The economic realities of the splits, and the invalidity of petitioner's theory about them, are brought into focus by consideration of a fundamental fact: petitioner never sought—and has never claimed it wanted to participate in the splits. The natural question—why did petitioner make no effort to obtain what it claims was so advantageous to its competitors—provokes the more significant counterquestion—why *should* Viking want to participate? The plain answer is that, given the splits between Goldman and Stanley Warner of various distributors' product, Viking, by participating, could gain nothing more than it already had. No matter how petitioner may becloud the point with theory, rhetoric, and charts, Stanley Warner's benefit from the splits necessarily comes down to the fact that on certain pictures Goldman refrained from making offers; and the identical advantage flowed to Viking and to every other first-run exhibitor: each was spared the competition of Goldman with respect to the very same pictures. The only way petitioner suggests that this advantage meant more to a split participant than to the "outsiders" is by its "sub-market" analysis (Brief, pp. 13-14). But this analysis is nothing more than a needlessly elaborate exposition of a peculiar claim that because a respondent exhibitor *refrains* from seeking pictures, it achieves a "concentration" of market power with respect to the *remaining* pictures which it does seek. And surely this hypothetical advantage—the "power" to seek fewer pictures—is within the reach of any exhibitor in or out of a split. Viking, having received every *benefit* of the splits—the limitation on the activities of respondent exhibitors—accepted no corresponding limitation on its own activities. Truly the very height of absurdity is reached when this absence of restriction is submitted as

unfair to Viking on the theory that it forces Viking to fritter away its market power on all the product rather than to limit itself to some smaller number of pictures.

Overwhelming evidence supports the Court of Appeals' unchallenged conclusion that "* * * each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split" (R. 2777). Each respondent distributor remained free to license any film to any exhibitor and made no commitment to deal preferentially with the split participants or to license any picture to them. Splits between Stanley Warner and Goldman meant only that these two exhibitors voluntarily refrained from bidding or negotiating for specified pictures (R. 114, 100, 103, 1816).

The split pictures did not "belong" to Goldman or Stanley Warner, and they were not "assured" of any picture on the splits. Stanley Warner and Goldman were frequently unsuccessful in licensing such pictures, and Viking consistently licensed the very films which Stanley Warner and Goldman had split. Of the 87 pictures in which Viking showed any interest, 48 had been split by Stanley Warner and Goldman. Viking was awarded 17 of them. Stanley Warner licensed 12 of these 48 for its three theatres. Goldman's three theatres got a total of 14, and 5 went to the non-respondent Arcadia and Trans-Lux Theatres (R. 1620-25; Ex. P-1, R. 2355-81). Viking successfully licensed 9 of the 10 MGM pictures for which it submitted offers in its first year of operations. Viking licensed 11 of the 17 United Artists' films it sought. All of the United Artists pictures and most of the MGM pictures which Viking licensed were split (R. 42-44, 49-51, 2363-68, 2370-73).

Splits clearly did not impair Viking's ability to obtain product first-run; they could only have enhanced Viking's competitive opportunities.

The Legality of Splits to Which a Distributor Consents.

When petitioner characterizes "splits" as having "every attribute of the classic division of markets agreement" (Brief, pp. 32-33) it is really referring to a division of product imposed on a *distributor*, without its consent, which violates the distributor's rights. The authorities which petitioner cites would have pertinence if a *distributor* were charging Stanley Warner and Goldman with collusively or secretly dividing the distributor's films. Just this kind of abuse was found in **Samuel Goldwyn Productions Inc. v. Fox West Coast Theatres Corp.**, 194 F. Supp. 507 (N. D. Cal. 1961) aff'd. 9th Cir. No. 17,725, Jan. 24, 1964 (not yet reported), cited on p. 43 of petitioner's brief, where a producer's attack on the agreement between exhibitors was sustained expressly because he had not consented to it.

A *distributor* would have a grievance if exhibitors, without its consent, split its films. But where the distributor *does* consent, the only party potentially aggrieved has been satisfied. And in fact the *prima facie* legality of a split to which a distributor consents is confirmed by the consistent position of the Antitrust Division of the Department of Justice, illustrated by the Department's recent requests to the distributors to *consent* to splits (Petitioner's brief, Appendix, pp. 3a-4a) and by the 1953 testimony of the Assistant Attorney General heading the Antitrust Division before the Senate Small Business Committee investigating motion picture distribution trade practices.[32] Simi-

32. Assistant Attorney General Stanley N. Barnes submitted a memorandum to the Committee discussing a situation where an exhibitor suggested a split of product in California. The memorandum stated in part:

"* * * I threw out the suggestion that in the situation as outlined by him it would seem that one possible solution might

larly, Judge Edmund L. Palmieri, who, as the judge assigned to hear and determine all applications addressed to the decrees arising out of **United States v. Paramount Pictures, Inc.**, 334 U. S. 131 (1948), may well be more familiar with current motion picture trade practices than any Federal Judge in the United States, recently stated:

> "Concededly, any arrangement whereby exhibitors agree with each other that they will not compete in the buying of the product cannot be countenanced; although it is equally clear that splits of product with the consent of both distributors and exhibitors are proper." (**United States v. Loew's Inc.**, 1962 CCH Trade Cases, Par. 70,347)

See also **Brown v. Western Massachusetts Theatres Inc.**, 288 F. 2d 302 (1st Cir. 1961).

This analysis demonstrates the anomalous legal position which Viking assumes. Having suffered no injury itself from these splits, Viking ironically attempts to stand in the shoes of the only party which could have been injured—the distributor—and asserts in this private treble-damage action a legal grievance which only the distributor could have raised. Petitioner's glib references to "divi-

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be splitting product and told him that we would regard an agreement between exhibitors to split product as improper, but that we had not taken the position it was improper for the distributors in such situations to advise the exhibitors that they were willing to split their product, as long as it was understood that it was up to the distributors that if they found that it did not work to their best interests, there was nothing to prevent them from changing their policy. * * *" (Report of Hearings before Subcommittee of Select Committee on Small Business, United States Senate [83d Congress, First Session] Motion Picture Distribution Trade Practices [1953] p. 664)

sions of the market" and "per se illegality" blur the fact that under no theory could the splits have been unlawful *as to Viking*. Petitioner cannot press a distributor's potential grievance in this private statutory action requiring injury to Viking's business or property. Clayton Act, § 4, 15 U. S. C. § 15; **Keogh v. Chicago & N. W. Ry. Co.**, 260 U. S. 156, 165 (1922).

The point appears precisely in Judge Parker's statement in **Alexander Milburn Co. v. Union Carbide & Carbon Corp.**, (4th Cir. 1926) 15 F. 2d 678, 683-84, cert. den. 273 U. S. 757 (1926). Assuming that plaintiff's competitors (suppliers of oxyacetylene products) had divided their market (one took the railroads, one the government), Judge Parker declared:

> "'An agreement between two corporations • • • dividing out the territory of the country for their trade operations, would unquestionably be an agreement in restraint of trade in violation of the act; *but a competitor of one of the companies would not have an action against it because the other company had withdrawn from the trade territory. Such withdrawal could not conceivably be the cause of damage to other competitors remaining in the field.* • • •"[33]

The Reasonableness of the Distributors' Consent.

In accusing the distributors of violating the Sherman Act for "having concurred and acquiesced" in the splits between Goldman and Stanley Warner (Brief, p. 34), petitioner obscures the fact that only the *distributor* might have a potential grievance against splits. The consent of the distributor, essential to the legality of a split, is here incon-

33. Wherever italics appear in this Brief the emphasis is ours.

gruously urged as the sole basis for a claim of antitrust violation *by* the distributor.[34]

Petitioner's glib charge that the distributors are guilty of "acquiescence in an illegal scheme" (Brief, p. 34) substitutes rhetoric for analysis. It is the very consent of a distributor which removes the only party who could claim to be aggrieved. The position of the Antitrust Division of the Justice Department, *requesting* the film distributors to "work out" splits, reflects the attitude of the government's antitrust enforcement arm that consent to a split is not illegal, much less illegal *per se*.

If there are two exhibitors in a market, and both—desiring to terminate bidding against each other for a distributor's films—join in requesting a distributor to consent to a split of its product, the distributor cannot be condemned for consenting. Indeed, the alternative—an interpretation of the antitrust laws requiring the distributor to insist on competitive bidding—would be contrary to this Court's conclusion that competitive bidding should not be mandatory. **United States v. Paramount Pictures**, 334 U. S. 131, 161-66 (1948). Thus those distributors who gave consent to a split between Goldman and Stanley Warner did not act unreasonably.

When Viking entered the market, each distributor assured it an opportunity to bid or negotiate for every film released first-run. And the facts confirm that this was no empty opportunity: 17 of the 34 films exhibited by

34. Viking's claims of conspiratorial discrimination by the distributors—the theory on which the case was presented in the trial court—are totally unsupported and indeed contradicted by the record. The Court of Appeals after a meticulous analysis of the evidence concluded that such charges lacked any evidentiary basis (R. 2780-89). The theory of petitioner's case in this Court reduces Viking's claim against the distributors to a single charge: their so-called "acquiescence" in the splits.

Viking during the relevant period had been split by Goldman and Stanley Warner (p. 19, *supra*).

Having assured Viking an equal opportunity to get each picture in competition with Goldman or Stanley Warner, did a distributor have a further obligation *to Viking* to compel both Stanley Warner and Goldman to compete for every picture? With respect to the pictures Viking *sought*, the distributor could hardly be expected to assume that Viking would want to *increase* the number of its competitors. With respect to the pictures Viking *did not seek*, the distributor could hardly be expected to imagine that Viking would care whether Stanley Warner and Goldman were bidding or not.

Petitioner treats the splits in Philadelphia as an economic anomaly giving rise to sinister inferences of exhibitor monopoly power. Yet its own brief (pp. 41, 43) reflects the fact that splits are not a unique Philadelphia phenomenon, understandable only in terms of devious motives or submission to monopoly power, but in fact are not at all uncommon. The explanation lies in the basic fact that a distributor's business interest extends beyond the income potential of any single picture. The more theatres doing business, the higher a distributor's total income. The distributor has an obvious interest in the economic success of a large number of exhibitor customers. The decline in the number of theatres which followed the advent of television, and the consequent decrease in the number of films produced, certainly warrants a distributor's concern for the preservation of as many outlets as possible. Where a split will encourage the over-all economic health of exhibitors, and does not deny any exhibitor his competitive opportunities, the distributor is fully warranted, and economically justified, in consenting to such a split. The distributor's immediate sacrifice of an additional potential bidder for any given picture may be more than compensated

by the ultimate economic advantage inherent in a thriving market for its product.

Petitioner's Sub-Market Monopolization Theory.

Aware that its treble damage case depends upon a showing of "injur[y] in its business or property" (Clayton Act § 4, 15 U. S. C. § 15), and that all the facts in this record show that Viking's competitive position was enhanced rather than impaired by the splits, petitioner abandons the record for an elaborate hypothetical argument, and asks this Court to reverse on the basis of a theory lacking evidentiary ground and not presented in the courts below. Essentially, petitioner attempts to convert the conspiracy action tried in the District Court (see pp. 4-5, *supra*) into a monopolization case against respondent exhibitors, a case which involves the distributors only because they were somehow trapped and driven to capitulate to the monopoly power of these exhibitors (Petitioner's brief, pp. 13-15, 30-34).[35] This new theory emerges from a manipulation of numbers and percentages.

Petitioner begins (Brief, pp. 13-14) by creating hypothetical "sub-markets" for first-run films in Philadelphia. These "sub-markets" are defined in terms of the splits. Each is assigned to a respondent exhibitor, and each consists of the films which the others will not seek.[36] The

35. The monopolization theory is more than just a new *approach* in this Court. In the trial court, Viking expressly disavowed any contention that this was a monopolization case, and monopolization was never mentioned in the Court of Appeals. See p. 5, *supra*.

36. The inclusion of 20th Century-Fox product as a special submarket for the Fox Theatre adds nothing to petitioner's theory except some additional portentousness. For clarity in presentation, we deal with petitioner's "sub-market" chart as submitted, including the Fox as the inhabitant of a separate sub-market of its own, but we do not, of course, wish to be understood as accepting petitioner's theory of a Fox split, fully refuted in the separate brief filed on behalf of respondents Twentieth Century-Fox and the Fox Theatre.

"Goldman sub-market" consists of the pictures Stanley Warner and Fox will not seek; Stanley Warner's "sub-market" consists of those which Goldman and Fox will not seek. We are told (Brief, pp. 13-14) that each of the respondent exhibitors "concentrated its total market power into one of these three sub-markets", and hence became a "near-monopolist." Petitioner calls this theory a "simple analysis of market structure" (p. 13). Indeed it is simple; it epitomizes petitioner's refusal to approach this case realistically.

(1) Within each sub-market, a power rating is assigned to each respondent exhibitor by adding up the number of seats in its theatres; and a corresponding rating is made for the other exhibitors (who, however, find themselves ultimately divided by three, pp. 40-41, *infra*).

Ironically, petitioner's new theory requires it to reverse completely a position consistently asserted by Viking's manager, Jay Wren, throughout twenty days of trial testimony. Wren clung to the position that a theatre's seating capacity had no effect whatever on the theatre's competitive potential.[37] This position was the very foundation of the theory on which petitioner's case was tried, the theory that the distributors rejected "superior" bids proposed by Viking. To show that his bids *were* "superior" to bids of theatres twice and three times Viking's size, Wren had to, and repeatedly did assert that seating capacity was an irrelevant competitive factor. Now, in this Court, seating capacity emerges as the critical determinant of a theatre's competitive power.

(2) Petitioner compounds the fallacy of its *total* reliance on seating capacity by aggregating the seating ca-

37. *E.g.* R. 446-47, 961-65, 969, 1029, 1318-1320.

pacity of all three theatres operated by Goldman and Stanley Warner, to compute the percentage of the respective "sub-markets" allegedly "controlled" by these exhibitors. Petitioner simply assumes that the power of an exhibitor to bargain for a picture is found in the aggregate number of seats in *all* of its theatres. But in first-run Philadelphia, where pictures are licensed competitively on a picture by picture basis, this assumption is totally unrealistic. Even assuming with petitioner that a "market" is defined by the number of persons sitting at the bargaining table at any given moment, an exhibitor owning three or ten or one hundred theatres in Philadelphia can only play and can only compete for *a* first-run film in *a single* theatre. Hence, only *one* of the theatres operated by Goldman or Stanley Warner can compete for *any* first-run film; and the *combined* seating capacity of the *three* theatres owned by each is meaningless as an indication of power in the real market—the buyer's market for first-run films in Philadelphia, which are licensed individually, and theatre by theatre. Here, petitioner really loses touch with reality. It draws a ludicrously distorted picture of the competitive situation: when the Stanton (1373 seats) competes with Viking (1017 seats) and Arcadia (650 seats) for a given picture, petitioner presupposes not only the obvious fact that the Stanton, because it is larger, might be considered a more attractive house, but that Viking's offer will be overwhelmed by the Stanton (1373 seats) *plus* the Mastbaum (4387 seats) *plus* the Stanley (2932 seats)—all three of Stanley Warner's theatres, totalling 8692 seats. Viking is thus undone by the 7319 seats of these two latter theatres—phantom competitors who were not in the market at all. In this way, finally, Stanley Warner (and Goldman, and Fox) emerges as a "near-monopolist" (Brief, p. 14).

(3) Finally, petitioner loads the statistical dice by *dividing by three* the seating capacity of the Viking, Ar-

cadia, Studio, Trans-Lux and World Theatres (Brief, p. 14). This division is presumably justified by the notion that these five theatres are *forced* to compete in all three of the hypothetical "sub-markets", so that their market power is dissipated in three directions at once.

Again, petitioner conveniently shuns the facts of first-run competition. For any given film which has been split by Goldman and Stanley Warner, and which appears, for example, on Stanley Warner's "side" of the split, *one* Stanley Warner theatre *and* the Viking, Arcadia, Trans-Lux, Studio and World theatres *each* have a full opportunity to compete. Hence, *six* theatres may compete for such a picture and, therefore, in Viking's hypothetical "sub-market", Stanley Warner's *one* theatre would control *one-sixth*, and Viking itself would also control exactly one-sixth.[38]

Clearly, Viking and all the non-respondent exhibitors were perfectly free to concentrate all their efforts into any one of the "sub-markets"; they were not like Stanley Warner and Goldman, locked by petitioner's theory into their own little markets. It is absurd to assume that a fragmented part of Viking was forced into three "sub-markets" at once. Whenever Viking entered one of these "markets" to compete for films, obviously all, and not just one-third of it, was competing.[39] Petitioner's "sub-market" chart shows what can emerge when figures are wholly divorced from competitive reality.

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38. Of course Viking *also* has a similar "share" of the other "sub-markets" from which, under petitioner's theory, Stanley Warner would be excluded.

39. Not only Viking but the other non-respondent theatres—the Arcadia, Trans-Lux, Studio and World—are subjected to the three-way fragmentation of petitioner's "sub-market" theory. And in an alternative theory presented in the Petition for Certiorari, which petitioner purports to preserve in a footnote on page 15 of its brief, the non-respondent theatres suffered a worse fate: they were simply eliminated.

Viking's Claim That Because of Splits It Paid Higher Film Rental.

Petitioner's brief argues that concentration of the asserted monopoly power of the respondent exhibitors in the hypothetical sub-markets forced the distributors "to discriminate in favor of the monopolists and against Viking" (Brief, p. 15). The alleged "discriminations", which were urged below as *proof* of conspiracy (R. 2767), are here transformed into *effects* of conspiracy—"merely illustrative of the illegal effects the [split] conspiracy had on the market" (Brief, p. 40). The "discriminations" referred to in petitioner's brief were fully considered by the Court of Appeals and were found to be unsupported by the evidence (R. 2780-89). They are specifically treated in the statement of the case, *supra*, pp. 20-25.

We turn now to petitioner's attempt to show injury on a theoretical basis—the claim that Viking "had to pay" higher film rental. Petitioner's theory of injury from the splits cannot cope with the basic fact that because of the splits, Viking had *fewer* competitors in seeking split pictures. Having one less competitor may have *assisted* Viking in obtaining films at lower costs, but it could not have been a disadvantage. By leaving one chair empty at the bargaining table, splits could only *reduce* Viking's film rental or leave it unaffected. Yet petitioner's brief (p. 26) argues that Viking "had to pay more than it would have in a freely competitive market"—meaning, to petitioner, a market without splits. No record reference is cited for this startling proposition, but Viking offers two theories in explanation.

(1) The first theory is that Viking's offers *had* to be high or they would have been rejected by distributors afraid to "risk alienating a monopolist" (Brief, p. 26). The inference is clear that with a high enough Viking offer,

the distributor would suddenly have lost its supposed apprehension of the respondent exhibitors—a concession that all the theorized sub-market power of Goldman and Stanley Warner counted for naught when a higher dollar offer came across the distributor's desk. The gratuitous charge that competing offers were weighed with a wary eye toward "alienating" Goldman and Stanley Warner—pure fiction unsupported by a line in the record—shows the extremes to which petitioner is driven in suggesting that it "had to pay" high film rentals.

(2) Petitioner's alternative theory of how it "had to pay" higher rentals (Brief, p. 26) is that the split participants were able to "conserve resources" while Viking was out of the market, and that they used these "conserved resources" to "bid up" films when Viking entered the market. Not a word of testimony supports the theory. Petitioner cannot identify a single instance where it lost a picture to a split participant because of an exorbitant offer; and the ultimate irony of the thing is that what Viking labored for weeks to prove in the trial court is the very opposite of the conclusion which it now asserts. In the trial court, Viking's major claim was *not* that Stanley Warner and Goldman took pictures against it with exorbitant offers, but with offers so inferior to Viking's that one could only assume the existence of a conspiracy.[40] Asserting that it was forced to make high offers, Viking also fails to identify which of its successful offers were made in response to supposed overbidding by respondent exhibitors.[41]

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40. This claim was rejected in the Court of Appeals' extended analysis. R. 2780-83.

41. Viking's manager Wren never testified that any of his bids was predicated on an attempt to surpass an exorbitant bid by a respondent exhibitor. Indeed, he repeatedly admitted at the trial that he made many mistakes in estimating a picture's box-office potential (R. 361-62, 396-97, 1304). He conceded, for example, that he made a serious mistake in offering $100,500 for MAN IN THE GREY FLANNEL

Viking's Percentage Approach to Film Rental.

In a final effort to convince this Court that Viking had to pay more to a distributor for its product than did the respondent exhibitors, because it faced one less competitor, petitioner turns from pure theory to the only "evidence" it can find in 7700 pages of trial transcript: some figures comparing the percentage of its gross receipts paid in film rental with the percentage paid by three of the respondents' theatres (Brief, p. 27).

The figures are meaningless as an indication of the price which Viking or anyone paid for product. A distributor, evaluating an offer, is interested in one thing—money, in dollars and cents. To the distributor, the *percentage* of gross receipts offered by an exhibitor is relevant only as it translates into a dollar amount. Obviously 30% of one theatre's gross receipts may represent to the distributor, in dollars, what 50% of the gross receipts of another theatre will produce.[42] The percentage figure is meaningful only when applied to the gross receipts. Unless the distributor is dealing with two theatres exactly equal in grossing capacity, *equal percentages* will result in *different dollar income;* and the converse necessarily follows: equal dollar income can result only from different percentages.

SUIT, which never approached the gross which he thought he could achieve (R. 303-4, 362). And the $100,000 offer Wren had surpassed, in his zeal for this picture, came not from a respondent exhibitor, but from the Trans-Lux (R. 467-8). Wren's admitted mistake on this one film is responsible for much of Viking's present complaint that it "had to pay" excessive film rentals, since the film rental paid for this picture accounts for over 16% of Viking's total film rental during the period in suit (R. 2067, 2647).

42. Normally the lower grossing theatre will be a smaller theatre, which can afford to spend a larger percentage of its gross receipts on film rental because it has lower operating and fixed overhead costs (R. 961, 2441).

Therefore, in comparing film rental *percentage* figures as if it were comparing prices paid, petitioner presupposes that Viking is equal in grossing potential to the theatres to which it compares itself. Of course the grossing potential of all these theatres is *not* equal—grossing potential is necessarily affected by several variable factors such as size, location, management and the like[43]—and petitioner itself has not only recognized, but exaggerated this patent fact by basing its whole "sub-market monopolization" case on the premise that seating capacity is the determinant of competitive success—the "relevant yardstick of market power" (Brief, p. 13), and thus, necessarily, of grossing potential. Whatever might be said of Viking's effort in the trial court to demonstrate that seating capacity meant nothing to grossing potential, Viking has now asserted that it means more than anything else; and hence, it has contradicted an essential premise of its comparisons of film rental *percentage* figures—the premise that the theatres compared had equal grossing potentials. They were not equal, and Viking's grossing potential was far less than that of the larger theatres with which it competed.

Petitioner's argument concerning percentage figures also fails to take account of the fact that film rentals reflect the business acumen of exhibitors in making offers which correctly anticipate box-office receipts (Viking's offers admittedly reflect bad judgment, R. 361-2, 397, 1304 *supra*, p. 43). Moreover, some theatres, unlike Viking (R. 400), followed a policy of consistently seeking cheaper, inferior films, and thus would be expected to pay less for them. (The Goldman and Stanton Theatres, two of the three selected in petitioner's chart, consistently showed such films (R. 857, 873-8). The figures respecting total

43. The Midtown Theatre, better located but most comparable in size to Viking, achieved a higher gross than Viking, although the Midtown's pictures, on the average, were inferior in quality (R. 894-95, 2067).

gross receipts and film rentals (R. 2067), from which petitioner derives the percentages in its film rental chart, reflect the wide variations in the percentages of gross receipts paid by the theatres of respondent exhibitors—ranging from the 33% paid by the Goldman to 48% paid by the Randolph. And a final anomaly in petitioner's film rental chart, which purports to show "high" rentals paid to "the distributors" is its inclusion of film rentals paid to RKO, no longer in this case (R. 2079), and to distributors who were never named as defendants (R. 2079-89).

Obviously, bare and selected figures as to percentage of receipts paid in film rental prove nothing more than the inevitable variance in percentages paid by different theatres for different pictures, and certainly do not support petitioner's assertion that it "had to pay" higher rentals because of the splits. No evidence was offered even to suggest a causal relationship between splits and the film rental paid by Viking, and petitioner's theories about "alienating monopolists" and "conserving resources" cannot plug the evidentiary gap.

Petitioner's Authorities Are Inapplicable.

Petitioner's attack on the respondent distributors in this case presents a completely unprecedented situation. The plaintiff, who was actually advantaged by the splits, is seeking treble damages from the only potential victim of the alleged restraint. The incongruity has been compounded by petitioner's use of classic division of market cases reflecting horn-book antitrust principles, as purported authority for *its* cause of action.

In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899), **United States v. National Lead Co.**, 332 U. S. 319 (1947), and **Timken Roller Bearing Co. v. United States**, 341 U. S. 593 (1951)—all government suits where

no specific showing of injury was necessary—there had been territorial divisions of the market by sellers, divisions which left the sellers with an unrestrained power to fix their prices. An obvious and properly presumed adverse effect existed, both on the non-consenting buyers, and on the ultimate consumer. And the question of consent by the potentially aggrieved parties was not and could not have been involved, because of the number of buyers in the market, and the disparity of their bargaining power.

This is an entirely different case. Here, since the only potential victim of a split is the distributor, its acceptance of the agreement precludes the possibility of an unreasonable restraint. Neither it, nor the non-participating exhibitors, nor the public can be adversely affected. Splits could not possibly affect admission prices Petitioner's attempt (Br. p. 43) to evade the fact that the Department of Justice has approved of splits, drives it to a remarkable distinction—directly contradicting the rationale of its own division of market cases—that a "division" among *all* exhibitors in a market may be lawful, but if, as here, some exhibitors choose not to participate in that "division", and brisk competition ensues, there emerges a restraint illegal *per se*. In this private action some showing of private injury is necessary. The complainant here is not the government, nor is he in a position analogous to that of the buyers in the market-division cases. This petitioner is precisely in the posture of a seller who asserts an antitrust claim against a competing seller for having *withdrawn* from his territory." **Alexander Milburn Co. v. Union Carbide & Carbon Corp.**, 15 F. 2d 678 (4th Cir., 1926), cert. den. 273 U. S. 757 (1926), *supra*, p. 35.

Petitioner attempts (Brief, p. 12) to analogize the splits in this case to the "pooling arrangements" held unlawful in **United States v. Paramount Pictures Inc.**, 334 U. S. 131, 149 (1948). As described in the District Court in *Para-*

mount, 66 F. Supp. 323 at 350, 351, a pooling arrangement involved two or more normally competitive exhibitors joining to operate as a unit, with all business policies collectively determined by a joint committee, and with the profits of all theatres shared by all members of the pool. The pool participants became a coalition; each had the fullest interest in the success of every theatre in the pool. Consequently, theatres outside the pool faced the combined market power of the pool at every point of confrontation. But the splits in the instant case had precisely the *opposite* competitive effect from the pooling arrangements in *Paramount*. Instead of presenting "outside" theatres with a coalition of competitors, the splits *removed* one competitor —leaving the outsider with fewer exhibitors against whom its offer must be weighed. Pooling arrangements accomplished a practical merger of the pooled theatres: not only competitors, but distributors, patrons, and everyone else were dealing with a single entity. But the split participants do not merge or coalesce to any degree; except for their limited withdrawal from seeking certain films, they continued to compete precisely as they would in the absence of splits.

Petitioner repeatedly cites **Continental Ore Co. v. Union Carbide & Carbon Corp.**, 370 U. S. 690 (1962) (Brief, pp. 28, 29, 31, 39, 46), in an attempt to exploit language from a recent decision of this Court based on facts utterly inapplicable to the instant case. In Continental Ore, the plaintiff was eliminated from the vanadium business because of its inability to obtain product from the defendants. The plaintiff had been repeatedly turned down in its requests for product. This Court reversed a holding that evidence of such repeated rejections was insufficient to establish adverse impact on plaintiff's business.

The case at bar is dissimilar from Continental Ore on every count. Here the plaintiff was never deprived of

product, but on the contrary had full opportunity to compete for every first-run film released in Philadelphia. Here the plaintiff—far from being eliminated from the market—had first-run films on its screen throughout the entire period in suit. Here the plaintiff, unlike Continental Ore which repeatedly requested the vanadium it was denied, never sought to participate in the arrangement which it now attacks as having given its competitors unfair advantage. Here the plaintiff—unlike Continental Ore—has established no adverse impact as a result of defendants' conduct, no injury whatever to its business or property, whether their conduct be considered individually or in the aggregate.

II.

THE TRIAL COURT CORRECTLY HELD THAT NO DAMAGE WAS SHOWN.

The trial court's direction of a verdict was based not only on its conclusion that Viking's evidence afforded no basis for a finding of conspiracy, but also upon a failure of proof respecting damage. The trial judge stated:

> "• • • I find that there is likewise no basis for a finding of another important factor or element of the plaintiff's complaint—the fact that plaintiff was damaged or injured as a result of any such combination or conspiracy." (R. 2351)

The Court of Appeals, convinced that conspiracy was not established, found it unnecessary to consider "the sufficiency of the proof as it relates to the issue of damages" (R. 2791). However, the patent inadequacy of the only proof Viking ever offered purporting to show its damage requires affirmance of the judgment on the additional ground that petitioner utterly failed to establish that it was "injured in its business or property" (Clayton Act § 4, 15 U. S. C. § 15).

As the trial progressed, the court repeatedly reminded Viking's counsel that he had thus far failed to produce any evidence of damage, and requested that evidence on this issue be offered (R. 1546-50; 1653-54). Finally, heeding the court's admonitions, petitioner tendered the only piece of evidence ever offered as probative of Viking's alleged injury, a calculation described as "Schedule A". Petitioner asserted that the bare figures in Schedule A, and these alone, *proved* that the Viking Theatre was injured (R. 1549).

Schedule A sets forth the *total* gross receipts of Viking and each of the seven theatres of respondent exhibitors from *all* pictures (whether distributed by a respondent distributor or not) played during the period in suit, and also the *total* film rental paid by each theatre. Each theatre's "net"—the difference between total gross receipts and total film rental—is then shown. Schedule A (R. 2067) is set forth in the margin, together with the seating capacities referred to in petitioner's brief.[44]

44.

Theatre	*Seating Capacity*	*Gross*	*Film Rental*	*Net*
Stanley	*2932*	$1,605,477.22	$ 685,660.65	$ 919,816.57
Mastbaum	*4387*	1,771,188.13	691,594.82	1,079,593.31
Fox	*2422*	1,987,496.51	729,851.34	1,257,645.17
Midtown	*994*	1,239,419.37	521,825.56	717,593.81
Randolph	*2026*	2,097,366.86	1,003,714.28	1,093,652.58
Goldman	*1188*	1,562,481.40	514,641.84	1,047,839.56
Stanton	*1373*	991,979.24	381,196.13	610,783.11
		(11,255,408.73)	(4,528,484.62)	6,726,924.11
Average	*2188*			960,989.16
Viking	*1017*	1,200,357.08	630,487.80	569,869.28
				$ 391,119.88

(R. 2067)

All of plaintiff's evidence concerning Schedule A appears on four pages of the printed record (R. 2065-68). Viking's manager Wren provided the Schedule's only evidential foundation with two conclusionary statements—that quality of pictures determines gross and that film rentals determine a theatre's success or failure (R. 2065-66). Viking offered no testimony—expert or otherwise—that its grosses and films rentals would have equalled the average of the seven theatres in the schedule, but for the acts of the respondents.

Basic to the entire theory of Schedule A as a measure of damages is the concept of an *average* box-office gross. But this concept depends for its validity upon comparability of grossing potential among the theatres being "averaged", since Viking is apparently complaining because its "net" fails to equal the *average* net of seven other theatres. Such an approach abandons elementary logic. If the 6000-seat Radio City Music Hall grosses $100,000 while a 400-seat theatre grosses $2,000 in the same week, is it meaningful to say that the two theatres "average" $51,000 per week? It is impossible to "average" non-comparable theatres—including those which lack the potential of ever reaching "the average".

There is, in fact, no comparability of grossing potential supporting Schedule A. The seven theatres which Viking would "average" have widely different seating capacities, some being two, three and four times Viking's size.[45] The average seating capacity of the theatres in Schedule A to which Viking compares itself is 2188, over *twice* Viking's

45. Petitioner not only admits that size is an important variant, but it predicates its entire "monopolization" theory on the premise that grossing potential varies in direct proportion to size. (See p. 39, *supra*.)

seating capacity. These theatres have different locations, different accessibility to public transportation (R. 865-70), differences in the experience and skill of theatre management (R 448).[46] Schedule A simply *averages* these plainly non-comparable theatres, including all the Philadelphia theatres which are larger than Viking and omitting all but one which are smaller.

The vast disparity of figures *within* the seven respondent theatres themselves, and the extremes by which they depart from the hypothetical "average" further expose the mathematical legerdemain of an "average" net. The Stanton's $610,783.11 net, for example, is far below Schedule A's $960,989.16 "average". Plaintiff originally omitted the Stanton altogether from Schedule A (R. 2166). When this single theatre was finally included, the "average" decreased by $50,000. Yet Viking seeks to measure its claimed damage by the amount of its own departure from the "average".

Viking, by its own concession, requires more playing time to equal the gross of theatres two and three times its size (R. 1072-73, 1153-54). Yet Schedule A compares Viking's gross with the gross of seven other theatres *over the same period of time*.[47] Since Viking concededly cannot match a larger theatre's gross over an equal period, it challenges reason to claim damages measurable by the average gross of *seven* theatres over the *same* 2½ years, when six of the seven theatres are larger—some enormously larger—than Viking.

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46. The 1017-seat Viking grossed $34,000 for the highest single-week gross in its history; the 2020-seat Randolph grossed $70,000 in one week playing a film of comparable national film rental (R. 1173-76).

47. Wren's testimony indicates that Viking requires 55% more time to gross what the Randolph can gross on a picture like CAINE MUTINY (R. 1153-54).

Schedule A's most startling proposition is that Viking's damage is proved by the grosses and film rentals of 381 pictures in which Viking itself displayed no interest whatever—some of which were outstanding successes which Viking voluntarily passed up.[48] Obviously Viking's damage cannot be shown by the box-office results of pictures Viking voluntarily passed up, or sought and conceded were properly awarded to others.[49]

Compounding the errors in Schedule A is the inclusion of many pictures released by several distributors who are not respondents in this case. For example, the total gross of the Midtown Theatre includes receipts from the eleven-week run of OKLAHOMA which was not distributed by a respondent (R. 2090-91). Schedule A purports to show that Viking's damage is proved in part by the Midtown's gross on this picture which no defendant distributor awarded. Moreover, Schedule A takes no account of RKO's dismissal from the case (R. 1985-87). Plaintiff's purported demonstration of damage remains unchanged.

Schedule A—with no evidential foundation—was the only offered evidence of petitioner's alleged damage. The trial court correctly held that there was "no basis for a finding" that petitioner was damaged (R. 2350-51) and on this ground the judgment should be affirmed.

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48. *E.g.* SEVEN YEAR ITCH (national film rental $4,879,000, R. 713-15); MOBY DICK ($4,500,000, R. 742-5).

49. *E.g.* KING AND I ($6,534,000, R. 2097); MAN WITH THE GOLDEN ARM ($4,023,000, R. 2095); SOLID GOLD CADILLAC $2,305,000, R. 1220-21); BUS STOP ($3,288,000, R. 1095).

III.

PARAMOUNT'S AGREEMENT WITH GOLDMAN WAS LAWFUL AND IMPOSED NO RESTRAINT ON VIKING.

Petitioner advances a special contention which applies to one distributor, Paramount, and one exhibitor, Goldman (or, as petitioner occasionally suggests, Goldman *and* Stanley Warner). It is claimed (Brief, pp. 40-41) that an agreement was made between Paramount and Goldman, and that it was a separate conspiracy which calls for reversal as to the respondents involved.[50]

The claim, as presented to the Court of Appeals, involved all the respondent distributors; and the only evidence of alleged damage, Schedule A, presupposed concerted and illegal conduct of all the distributors. There was no attempt at differentiation. With the case presented in this posture, the Court of Appeals, finding no evidence of participation by other distributors in the alleged agreement, did not need to reach the narrow issue now posed by petitioner: the legality of Paramount's relations with Goldman.

Even if the claimed agreement had existed, it would have been neither unlawful, nor detrimental to the Viking Theatre.

Petitioner's primary evidence of the "Schwalberg Agreement" was the testimony of Paramount's former president, Alfred Schwalberg, concerning a meeting in 1953.

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50. The agreement is referred to as the "Paramount Agreement" in the opinion of the Court of Appeals (R. 2777-2780). The contention that Stanley Warner was involved in the agreement is treated at p. 57, *infra*.

According to Schwalberg, Goldman was unwilling to submit formal bids to Paramount. He understood that his failure to do so would destroy his chance to license any Paramount picture if a competing exhibitor's bid met Paramount's "national policy"—Paramount's predetermined standard of minimum acceptable terms. What Goldman requested was to be given the chance to make an offer after Paramount had bid a film, *if* Paramount received no acceptable terms. If Goldman then could offer a deal "equal to or better than national policy," Paramount would accept. Paramount simply agreed with Goldman that, while it would continue to invite the bids of every first-run exhibitor in Philadelphia, and continue to license its films to those who made satisfactory offers, it *would* negotiate with Goldman, despite Goldman's failure to have bid, *if* no acceptable bid was received (R. 1832-34). Goldman, having passed up the *first* call to the other exhibitors, got the privilege of a second call.[51]

Whatever arrangement Schwalberg made with Goldman in 1953, there was, during the period in suit, no "Schwalberg Agreement" as petitioner describes it and this appears in petitioner's own documentary evidence. Paramount did *not* refuse to negotiate with others if it rejected all bids on a given picture. During the period, Paramount rejected all initial bids on only six pictures, and therefore, only six could conceivably have come within the scope of the "Schwalberg Agreement". There was no evidence that

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51. Petitioner's brief (p. 8) quotes a memorandum prepared long after the event by a Paramount official, Owen, who had no personal connection either with the agreement, or any possible implementation thereof. The only real inconsistency between Schwalberg's testimony and Owen's after-the-fact "understanding" lies in Owen's assumption that Stanley Warner was a party to the arrangement—a point treated *infra* at p. 57. Although Owen does not spell out the background and limitations of the agreement he describes, as Schwalberg does, he does specifically note that if a competitior of Goldman submitted an acceptable bid, "the acceptance closed the sales file".

Paramount refused to negotiate with Viking on any one of these. In four cases, there was in fact *affirmative* evidence either of Paramount's invitation to Viking to negotiate or that it did in fact negotiate with Viking; and in one case, Viking itself licensed the picture on post-bidding negotiations.[52]

Petitioner is entitled to treble damages only if unlawful conduct occurred, and had an impact on its business. Clayton Act § 4; 15 U. S. C. § 15. But petitioner has failed to produce any evidence that it was ever once denied the opportunity to negotiate with Paramount much less that it ever lost a picture through any such denial. It attempts to camouflage this glaring deficiency in its proof by the incorrect assertion that "the Court of Appeals held that a jury issue was presented on the existence and operation of the agreement" (p. 9). The Court of Appeals expressly recognized the inconsistency between the existence of the agreement petitioner alleged, and the facts about the actual licensing of Paramount films. It accepted petitioner's *construction* of the agreement, *arguendo*, but it never suggested there was evidence that it was in operation during the period:

> "* * * It was agreed that Goldman would not be required to submit bids, but the effect of the modification is otherwise not clear. However, there is evidence from which it may be inferred that the agreement as construed by Paramount, contemplated exclusive negotiations with either Stanley Warner or Goldman upon the rejection of all bids for any picture included on its split. *This construction is refuted by most of the evidence, but we, nevertheless, accept it as the correct one for the purpose of argument.*" (R. 2776)

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52. R. 547-53, 613-18, 1221-22, 1226-28, 1901-2, 1607, 1873-76, 1921; 1928-30, 2669, 2677.

Having assumed *arguendo* the existence of a "Schwalberg Agreement" involving Paramount, the Court of Appeals held there was no evidence that any distributor other than Paramount "either knew of, acquiesced in, or adhered to the agreement" (R. 2780). The Petitioner still asserts that all the distributors were involved, that "Mr. Goldman had this same arrangement with other distributors" (Brief, p. 9), but this challenge of the factual conclusion of the Court of Appeals is made with nothing to support it. While Petitioner promises to demonstrate the involvement of other distributors (Brief, p. 9), its ultimate demonstration consists of no more than a claim that two pictures were licensed to Goldman by one distributor after a Viking bid had been rejected.[53]

Petitioner's reluctance to take a position on whether Stanley Warner was a party to the "Schwalberg Agreement"—its preference for ambiguity on this matter[54]—is one of its few concessions to inescapable record facts. The "Schwalberg Agreement" could not have applied to Stanley Warner because it presupposed a policy against bidding, and Stanley Warner consistently bid (R. 80, 1930).

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53. Plaintiff's ponderous analysis of McConnell Story (Brief, p. 23) is based entirely on an inconsistency between a branch manager's recollection that a picture was licensed to Goldman in August and the documentary evidence that it had been licensed in July. Regardless of which date is selected, the fundamental point remains the same: the distributor was able to get the desired playing time from Goldman (the very valuable Labor Day weekend), whereas Viking could not have supplied it. No additional offers by Viking could have changed this situation (R. 190, 797-98, 802-03, 1808, 2429-30).

54. In the third "Question Presented" (Brief, p. 2) Goldman *and* Stanley Warner are referred to, and at page 38, Stanley Warner is again included in a conclusory statement. On the other hand, Petitioner's factual description of the Schwalberg agreement begins with the statement that "*Mr. Goldman's* objective, however, was more far reaching * * *" (p. 7), and concludes with the unsupported statement that "*Mr. Goldman* had this same arrangement with the other distributors" (p. 9).

The issue about the Schwalberg agreement is not, as Petitioner asserts (Brief, p. 28) whether "one distributor and one exhibitor are sufficient to constitute a conspiracy" (nor, as we have seen, was this the issue either presented or determined in the Court of Appeals). It is obvious that not every agreement between one exhibitor and one distributor will automatically violate the Sherman Act. The critical question is whether the agreement is an unreasonable restraint of trade. And even the "Schwalberg Agreement" as construed by Petitioner neither restrained Paramount's power to get whatever offer might prove best for it, nor imposed any disadvantage on a competitor. The competitor got the first chance at Paramount product, and Goldman got the second. It is hardly significant that there might not be a *third* chance if the second offer was accepted. The alleged agreement touches only a very small part of the product of one motion picture distributor. By its own limited terms, it could come into play only in the necessarily infrequent situation where no exhibitor but Goldman was willing to offer what Paramount expected for a given film. The agreement was clearly nothing but a mechanical solution of a problem with one exhibitor who refused to make formal bids, and it could not have had a substantial effect on a significant portion of any market.

Petitioner's authority, **United States v. Paramount Pictures, Inc.**, 334 U. S. 131, 160 (1948), merely highlights the fact that the "Schwalberg Agreement" is innocuous in terms of meaningful restraint upon competition. There, the contracts held to impose an "unreasonable discrimination" affected *all* the product of the distributor and *all* the theatres of the exhibitor. They gave the large exhibitor circuits the privilege of picking and choosing films, while small competitors were forced to license all the product released. They gave the circuits the right

to offset film rental at one theatre against that at another, and several similar advantages. The agreement here attacked is at the other end of the scale, having only a minimal and remote potential impact in a context of theatre-by-theatre and picture-by-picture licensing.

IV.

THE TRIAL COURT'S RULINGS ON EVIDENCE WERE PROPER.

Petitioner's statement of the case is noticeably lacking in factual content. It rests primarily on a few comparative figures, and argument. When, therefore, petitioner says (Brief, pp. 44-45) that *all* the comparative figures on which it relies in its statement of the case are taken from rejected offers of proof, and that without them it "cannot give a coherent statement of the conspiracy" (Brief, p. 45), petitioner tells far more about the deficiencies of the evidence which it offered, and which was admitted, than about the importance of the few offers of proof which were rejected.

Petitioner's claim that it has somehow been constrained, by evidential rulings, in presenting its case, is refuted by its acknowledgment that it has set forth in its statement the material contained in the rejected offers of proof, as if they had been received. Petitioner *has* presented the excluded evidence, as fully as it saw fit, without any kind of constraint, to this Court, and to the Court of Appeals.[55] And respondents too, here and in the court

55. It is simply not true that the Court of Appeals "avoided" the evidentiary issue "altogether" (Brief, p. 48). That Court and the respondents considered petitioner's rejected evidence *as if it had been admitted*; the Court rejected that evidence on its merits, evaluating it with meticulous care (R. 2781, 2784-88, 2790-91).

below, have dealt with the rejected evidence as if it had been admitted, and have shown that it is utterly insubstantial. Neither the evidence in the record, nor that which was excluded, supports petitioner's case.

A brief description of the excluded offers of evidence will demonstrate the point. Petitioner implies that there were a great many exclusions of evidence and that *all* of the rejected proof was critical (actually there were nine or ten rejected offers), yet petitioner finds only three which are worthy of mention in its statement of the case. These three concern adjustments, total national film rental, and the alleged disproportion of quality film obtained by the Viking.[56]

The offered "proof" of discrimination with respect to film rental adjustments has already been covered in detail (pp. 20-23, *supra*). Nothing more was offered than figures which were patently incompetent as evidence of discrimination; there was nothing in the raw data to indicate that adjustments were denied to the Viking which under similar circumstances would have been given or were given to anyone else. So crude were petitioner's figures that they permitted no differentiation: there was nothing to show

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And the petitioner's outraged statement that "some of the offers of proof were never mentioned in the [Court of Appeals] opinion" (Brief, p. 48), is almost comic in view of the fact that petitioner itself has seen fit to mention only a few.

56. In its argument (Br., p. 45) petitioner refers in passing to several matters as within the challenged exclusionary rulings, some of which were not excluded at all (number of bids, number of guarantees); and some of which were never offered (number of pictures played per theatre).

The "proof" referred to in footnote 20 on page 47 of petitioner's brief was not in fact rejected, it was never offered, and petitioner's counsel stated he had offered all the proof he wished to offer (R. 1052).

which distributors gave adjustments, or how many, or in what amount. Even RKO lurks anonymously among the figures. Petitioner lamely states that the question of which distributor made which adjustment was not raised "in the context in which the oral offer was made" (Brief, p. 48). But the very context of this and all petitioner's offers *was* one of sweeping generality.[57]

The second rejected offer of proof to which petitioner adverts (Brief, p. 25), is a comparison of the total national film rental of the pictures played at the Viking with that of the pictures played at theatres of respondent exhibitors. (Such a total is reached by adding up the national film rentals of all pictures played in the theatre.) This offer, purporting to compare the quality of product obtained by these theatres (R. 1048-9), was excluded not because it concerned pictures other than those in which Viking showed some interest, but only because it *proved* nothing (R. 1053-54). The use of *total* national film rental figures, rather than *average* national film rental figures, was a glaringly false criterion by which to compare the quality of pictures.[58]

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57. Petitioner implies that the only way the figures *could* have been put *into* evidence would have been on a distributor by distributor basis. Yet every one of petitioner's comparative figures, whether admitted or excluded, lumps the figures for all distributors. See, *e.g.*, R. 2067.

58. A comparison of *total* national film rentals as an indication of quality is meaningless because it equates an outstanding picture played for a substantial period, with a group of "slough" pictures having the same or higher total national film rental (played on short runs and double featured) during the same period. In other words, it is weighted by *quantity*. Wren admitted that one top picture would be preferable to a group of weak ones (R. 1124-26). *Average* national film rental (the total national film rental divided by the number of pictures played), which does reflect quality, was rejected by petitioner as a test because it shows that the average picture played by Viking *exceeded* in quality the average picture played by the Midtown, Goldman or Stanton Theatres (R. 41-56, 894-95, 850-57).

The third and last offer of proof mentioned by plaintiff also concerns an alleged disparity in the quality of product obtained by Viking and the split participants (Brief, p. 25). The offer purported to compare the number of pictures with national film rental over $3,000,000 and $4,000,000 played by Viking, and by respondent exhibitors. These figures include far more pictures which Viking ignored, than it sought. If Viking had sought *none*, the comparative number of these high quality films played by others would have been even *higher*—yet obviously this would demonstrate no unfairness to Viking. Viking made offers for only 10 of the 31 pictures having a national film rental over $4,000,000, and 13 of the 49 pictures with national film rental over $3,000,000. And considering the $3,000,000 national rental pictures Viking *sought*, it fared as well or better than any of respondent's theatres except the Randolph and Fox; and on $4,000,000 pictures did as well or better than any except the Randolph (R. 28-29, 41-56, 2644-48).

This is the rejected evidence to which petitioner refers when it asserts (Brief, p. 44) that "The decision below rests on a theory of evidence which, if not exploded by this Court, could well spell an end to private antitrust suits." It is these few meaningless offers which petitioner now proclaims to be essential to a "coherent statement of the conspiracy" (Brief, p. 45).

We have shown that the rejected evidence was considered and rejected on its merits, in the Court of Appeals. In rejecting it, the court announced a rule of evidence no more esoteric or unique than the simple requirement of relevance. The Court of Appeals concluded that the offered evidence had no probative value, and certainly its conclusion was correct: petitioner itself sees fit to refer

in this court to only three of the allegedly critical bits of evidence which were excluded, and even these selected figures are plainly unable to prove that for which they are offered. To support its charge that the Courts below are undermining the antitrust laws, petitioner urges that they adopted an inflexible evidentiary principle confounding its attempts to prove its case. There was no such ruling. Petitioner has attempted to transform a number of distinct and perfectly appropriate rulings into one arbitrary statement that evidence "relevant to proof of a conspiracy" must be limited just as is evidence "relevant to the scope of recovery" (Brief, pp. 45-46). This effort involves not only misrepresentation of the rulings below,[59] but a striking inconsistency with petitioner's own position that the "conspiracy was complete when the splits came into effect." Petitioner ignores the fact that whatever theoretical relevance its rejected evidence might have had to the conspiracy it attempted to prove in the trial court, it has no conceivable relevance to the case it attempts to prove here. The continuing assertion that the rejected evidence was relevant not to damage, but to the very existence of conspiracy, is plainly mistaken.

The evidentiary rulings of the district court were carefully made, and carefully reviewed by the Court of Appeals. The district court was not only correct in a technical legal sense, but wise in refusing to permit this case to founder in an endless pursuit of unimportant detail. It asserted

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59. The primary ruling was that Viking could not show a failure to get the quality it deserved by reference to pictures it had neither sought nor been precluded from seeking (R. 216-17). Where evidence was offered which had independent relevance, the fact that it concerned pictures which Viking never sought did not bar its admission. Indeed, the record is replete with evidence respecting pictures which Viking never sought. *E.g.*, R. 40-56, 90, 116-17, 192-3, 347-49, 744-51, 755-56, 882-83, 936-42, 944-46, 948-56, 962, 1018-22, 1533, 2335.

the kind of control without which the courts cannot effectively conduct antitrust litigation.[60]

CONCLUSION.

For all the foregoing reasons, respondents urge that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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60. "It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is, to let the parties exhaust the cross fire of pleading to conduct open-court pre-trial hearings, or to let counsel try the case as they please. The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed." (The Committee Report on Procedure and Antitrust and Other Protracted Cases, adopted by the Judicial Conference of the United States, 13 F. R. D. 62, 66).